

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-4134

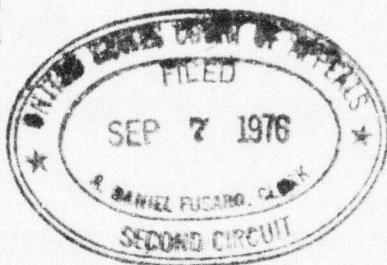
IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ESTATE OF JOSEPH VATTER, DECEASED,)
ANNA VATTER, EXECUTRIX,)
Appellee)
v.)
COMMISSIONER OF INTERNAL REVENUE,)
Appellant)

Docket No. 76-4134

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BRIEF FOR THE APPELLEE



Sydney R. Rubin
Attorney for Appellee

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No. 76-4134

ESTATE OF JOSEPH VATTER, DECEASED,
ANNA VATTER, EXECUTRIX,

Appellee

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellant

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUE PRESENTED

PRELIMINARY STATEMENT

The government appeals from a decision of the United States Tax Court entered pursuant to an opinion of the Court holding that selling expenses which the executrix-appellee incurred in selling rental properties are allowable administration expenses under New York law, and

are therefore deductible from the value of the gross estate under section 2053(a) of the Internal Revenue Code. The Tax Court opinion was written by Hon. Bruce M. Forrester and is reported at 65 T.C. 633.

ISSUES PRESENTED FOR REVIEW

The following issues are presented for review on this appeal:

1. Whether the Tax Court erred in finding that the selling expenses are allowable administration expenses under New York law, and therefore are deductible from the gross estate for federal estate tax purposes under section 2053(a) of the Internal Revenue Code.
2. Whether the Tax Court erred in finding that the selling expenses were necessarily incurred to effect the distribution of the residuary estate to the testamentary trust within the meaning of section 20.2053-3(d)(2) of the estate tax regulations.
3. Whether the regulations, if they conflict with section 2053(a) of the Code, are valid.
4. Whether the findings of fact and the determination of New York law, upon which the Tax Court based its conclusions, are clearly erroneous.

STATEMENT OF THE CASE

The Tax Court decided this case on fully stipulated facts as summarized below.

The decedent, Joseph Vatter, died testate on May 5, 1968. His will was admitted to probate in the Surrogate's Court for Monroe

County, New York. It named his wife, Anna Vatter, as executrix, and the Genesee Valley Union Trust Company as trustee of a residuary trust, and they duly qualified in those capacities. (R. 22).

Among the assets of the estate were three parcels of real estate which the decedent had owned, located at 261 Melville Street, 367 Pullman Avenue, and 783-85 Arnett Boulevard in the City of Rochester, New York. (R. 21, 31).

The decedent had acquired these properties at bank foreclosure sales during the years 1935 and 1940. (Stip. 13, R. 25). In view of the age of the properties it was necessary from time to time to expend sums for maintenance and repairs. (Stip. 14, R. 25). The trustee did not wish to have the properties turned over to it to manage as the corpus of the trust (Stip. 15, R. 25; R. 72), and was neither equipped nor willing to provide the maintenance and repairs which the properties required. (R. 79, footnote 6). At the trustee's request, and pursuant to a power of sale granted to her by Paragraph Eighth of the will (Stip. 7, R. 22), the executrix sold the properties, incurring certain selling expenses. (Stip. 3, R. 21; Stip. 7, R. 22, 23). She conveyed the properties by executor's deed. (Stip. 7, R. 23). (Power of sale was also granted to the trustee. Stip. 5, R. 22).

The cash needs of the estate totaled \$24,648.64 for expenses, taxes, and to fulfill the marital deduction bequest. (Stip. 10, R. 23, 24, 70, 71). To meet these needs, \$21,029.22 was available from the proceeds of an annuity paid to the estate. (Stip. 9, R. 23; Stip. 11, R. 24; R. 71). On the estate tax return, the executrix deducted

from the value of the gross estate, as expenses incurred in administering property of the estate, the real estate commissions, closing costs and expenses of complying or the multiple residence laws, incurred in the above sales, totaling \$6,012.68. (Stip. 3, R. 21, R. 71). The government allowed the selling expenses of the Melville Street property (\$1370.00) because of the difference between the \$21,029.22 cash annuity receipt and the cash needs of \$24,648.64 (Stip. 11, R. 24, R. 72), but disallowed the remaining selling expenses (R. 12), resulting in a deficiency of \$517.40 (R. 11).

At the time of the Tax Court opinion no accounting had been filed in Surrogate's Court (Stip. 11, R. 24, 25), and none has yet been filed.

The issue in the Tax Court was whether the disallowed selling expenses should have been allowed as deductions from the gross estate under section 2053(a) of the Code. Upon the facts and an examination of the New York law, the Tax Court held that the selling expenses are allowable administration expenses under New York law, and further found that they were necessarily incurred to effect distribution of the residuary estate within the meaning of the Commissioner's regulations. Accordingly, it held for the taxpayer. The government appeals from that decision.

SUMMARY OF ARGUMENT

The executrix was authorized both under the New York statute and by the express terms of the will to sell the properties. (R. 64; sec. 11-1.1(b)(5)(B) E.P.T.L.). She sold them as executrix and conveyed them by executor's deed. (Stip. 7, R. 22, 23). Section 11-1.1 (b)(23) E.P.T.L. authorizes an executor to pay all "reasonable and proper expenses of administration from the property * * * ." Therefore the selling expenses were allowable administration expenses under New York law. Since section 2053(a) of the Code permits the deduction from the value of the gross estate of administration expenses allowable by the laws of the jurisdiction where the estate is being administered, the selling expenses are deductible for federal estate tax purposes.

In reaching its conclusion so holding, the Tax Court made a de novo inquiry into the New York law and the factual necessity for incurring the expenses, in accordance with this Court's opinion in Estate of Smith v. Commissioner, 510 F.2d 479. It is immaterial that the expenses were not yet allowed by a Surrogate's decree because section 2053(a) of the Code requires only that they be "allowable." The Commissioner's regulations so recognize. (Reg. Sec. 20.2053-1 (b)(2)).

The New York statute applicable in Smith requiring that expenses of administration be "necessarily incurred" (Sec. 222, Surrogate's Court Act) was changed, and the statute applicable to this case (Sec. 11-1.1(b)(23) E.P.T.L.) requires only that they be "reasonable and proper." Clearly the selling expenses in this case were "reasonable and proper."

The Tax Court also found that the selling expenses met the test of the Commissioner's regulations as having been "necessarily incurred" to effect distribution of the estate. (Reg. Sec. 20.2053-3 (a). R. 80). For the properties were old, and required maintenance and repairs which the trustee was neither equipped nor willing to provide. The trustee therefore requested that the executrix sell them. (Stip. 14, R. 25; Stip. 15, R. 25, 72; R. 79, footnote 6). Accordingly, the Tax Court found it unnecessary to pass upon the validity of the regulations.

Under a reasonable interpretation of the Commissioner's regulations, selling expenses which the executrix incurred in the circumstances of this case which were "reasonable and proper" for New York administration purposes, were also "necessary" within the meaning of the regulations. Thus, the taxpayer met the requirements of both the New York law and the regulations, as the Tax Court held. If, however, it is determined that the test of the regulations was not met, they are invalid as going beyond section 2053(a) of the Code. Estate of Park v. Commissioner, 475 F.2d 673 (C.A. 6); Ballance v. United States, 347 F.2d 419 (C.A. 7).

Further, the questions in this case are essentially questions of fact. Accordingly, the findings and decision of the Tax Court should not be disturbed unless they were "clearly erroneous," which they were not. The same principle applies to the Tax Court's determination, upon de novo inquiry, of the New York law. Indeed that is the basis upon which this Court affirmed the Tax Court's decision in Estate of Smith v. Commissioner, 510 F.2d 479.

ARGUMENT

I.

THE SELLING EXPENSES ARE ALLOWABLE ADMINISTRATION EXPENSES UNDER THE LAWS OF NEW YORK AND UNDER THE COMMISSIONER'S REGULATIONS; THEREFORE THEY ARE ALLOWABLE DEDUCTIONS FOR ESTATE TAX PURPOSES.

Section 2053(a) of the Internal Revenue Code provides that "the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts * * * for administration expenses * * * as are allowable by the laws of the jurisdiction [in this case New York] under which the estate is being administered." The executor sold the properties and incurred the selling expenses in question in her capacity as executrix, and conveyed the properties by executor's deed. (Stip. 7, R. 22, 23). Both the decedent's will and the New York statute expressly authorized her, in her capacity as executrix, to make the sales. (R. 64; Sec. 11-1.1(b)(5)(B) E.P.T.L.).

Obviously, therefore, the selling expenses were allowable administration expenses under New York law. Section 11-1.1(b)(23) E.P.T.L. authorizes an executor to pay all "reasonable and proper expenses of administration from the property * * *." Section 13-1.3(a)(1) makes all of the property of the decedent and any income therefrom chargeable with the payment of administration expenses, and Section 13-1.3 (b) provides that no distinction shall be made in this regard between real and personal property.

The government does not seriously question the Tax Court's finding "that these selling expenses are allowable administration expenses

under New York law." (R. 75, 78). Indeed it concedes that the Tax Court "may well have been correct" in so finding. (Brief 19, 26). The government says, citing this Court's opinion in Estate of Smith v. Commissioner, 510 F.2d 479 that "the need for a de novo inquiry into the factual necessity for the instant expenditures is especially compelling since no local court has approved the expenses." (Brief, 25). It is obvious from Judge Forrester's opinion that he made a most careful inquiry and examination of the New York law in this regard, in reaching his conclusion. Indeed, precisely because there was no determination by the Surrogate, he had no alternative but to do so. See Judge Mulligan's dissent in Smith (510 F.2d at 484) discussing a similar situation in Pitner v. United States, 388 F.2d 651 (C.A. 5th).

Further, it is clear that whether the expenses have been "allowed" is immaterial under section 2053(a) because that section requires only that they be "allowable." Pitner v. United States, 388 F.2d 651 (C.A. 5th); Estate of Jane de P. Webster v. Commissioner, 65 T.C. No. 83. The Commissioner's own regulations provide that "a reasonable expense of administration will not be denied because no court decree has been entered if the amount would be allowable under local law." (Reg. Sec. 20.2053-1(b)(2)).

Accordingly, we submit, it is plain and beyond question that the executrix, acting in that capacity, had the authority to sell these properties and to incur the selling expenses under New York law, and that these are allowable administration expenses under that law. The government acknowledges that this was true of the Melville Street property.¹ And surely this is no less true of the Pullman Avenue and Arnett Boulevard properties.

¹It is stipulated that the government allowed the deduction of the Melville Street selling expenses (Stip. 11, R. 24).

The real questions in this case therefore come down to these:

1. Although the expenses were plainly "reasonable and proper" and therefore allowable under State law (Sec. 11-1.1(b)(23) E.P.T.L.), are they nevertheless unallowable for federal estate tax purposes, notwithstanding that Section 2053(a) of the Internal Revenue Code expressly allows administration expenses which are allowable by the laws of the jurisdiction?
2. Was it "clearly erroneous" for the Tax Court to find that, in the circumstances of this case, the selling expenses were necessarily incurred to effect distribution of the residuary estate within the meaning of Section 20.2053-3(d)(2) of the estate tax regulations? And, even if it was, are the regulations valid?

A.

By the Plain Words of Section 2053(a) I.R.C. Administration Expenses Allowable by the Laws of the Jurisdiction Are Allowable for Federal Estate Tax Purposes.

As Judge Forrester pointed out in the opinion below (R. 79, footnote 5), the Sixth and Seventh Circuits have held that administration expenses allowable by the law of the jurisdiction are allowable for federal estate tax purposes, because this is what Section 2053(a) says. Estate of Park v. Commissioner, 475 F.2d 673 (C.A. 6) and Ballance v. United States, 347 F.2d 419 (C.A. 7). In Pitner v. United States, 388 F.2d 651 the Fifth Circuit says that the test of respondent's regulations must also be met. Neither the Tax Court in this case or in Smith, or this Court in Smith, had to decide this question squarely. The Tax Court in this case found that the estate

met the tests of both State law and the regulations. (R. 78-80). This Court, in Smith, held that the Tax Court's decision did not involve a refusal to follow New York law, but rather was the result of a de novo inquiry into the factual necessity for these expenditures." It therefore found it unnecessary to pass on the validity of the treasury regulations. (510 F.2d at 483). For, as this Court pointed out in Smith, the controlling statute (Surrogate's Court Act, Sec. 222) and the Commissioner's regulations both required an administrative expense to be "necessary" in order to be allowable. (510 F.2d at 482). David Smith died in May of 1965, whereas this decedent died in May, 1968 (Stip. 20). The law of New York changed in the meantime, as both this Court and the Tax Court pointed out. (510 F.2d at 481, footnote 1; R. 78, footnote 5). Whereas Section 222 of the Surrogate's Court Act required that expenses of administration be "necessarily incurred," Section 11-1.1(b)(23) E.P.T.L. (renumbered as 11-1.1(b) (22)). which controls this case, speaks instead of "reasonable and proper expenses of administration * * *."

If indeed there is now a divergence between the Commissioner's regulations and the New York statute we submit that the decisions of the Sixth and Seventh Circuits in Park and Ballance, supra, represent the better view. In Park a unanimous Court held that, "by the literal language of Section 2053(a), Congress has left the deductibility of administrative expenses to be governed by their chargeability against the assets of the estate under State law." It declined to draw the distinction, which the government also urges here, "between what is necessary for the estate and what is for the

individual benefit of the beneficiaries" as unwarranted under Sec. 2053(a), and also as being untenable "because any action that benefits the estate will also in effect benefit the beneficiaries."² In Ballance, the Seventh Circuit, finding that interest costs were an allowable expense of administration under Illinois law unanimously held that they were likewise allowable for federal estate tax purposes, and that "the definition of 'administration expenses' in the treasury regulation * * * cannot serve to override the statutory provision (Sec. 812) [the 1939 Code forerunner of Sec. 2053(a)]."

The Tax Court in this case followed its earlier decision in Estate of Louis Sternberger,³ 18 T.C. 836 -- a case squarely in point. This Court affirmed the Sternberger decision (207 F.2d 600), reversed on other grounds (348 U.S. 187), although it does not appear whether the question here in issue was presented to this Court in that case. The government says Sternberger has been overruled (Brief 22). That is not so. On the contrary, the Commissioner continues to acquiesce in that decision on the point here involved. (1953-1 C.B. 6 (footnote 6)).

More recently, the Tax Court reaffirmed these principles in Estate of Jane de P. Webster v. Commissioner, 65 T.C. No. 83. It there held that post-death interest paid on loans which the decedent

² An analogy may be found in Parshelsky v. Commissioner, 303 F.2d 14, where this Court declined to draw a line between corporate benefit and shareholder benefit in the case of a closely held corporation. "The benefits to the corporation and to the shareholders are virtually indistinguishable."

made during his lifetime was an allowable administration expense for estate tax purposes, upon finding that it was allowable under the laws of the jurisdiction (Massachusetts). The Court also pointed out that even if the executors could have retired the debt earlier, "there was no necessity for them to do so."

There is nothing novel or unusual about the fact that Congress, in this situation, as in many others, has tied deductibility for federal estate tax purposes with State law. Accordingly, even if there were a divergence between State law and the Commissioner's regulations, the State law would control.

To overcome the plain words of section 2053(a) the government argues that the executrix incurred the expenses "acting as a 'trustee.'" (Brief 19). This is a strained construction indeed, in an effort to overcome the plain words of section 2053(a). But it is stipulated that the executrix took possession of the properties and sold them "in that capacity," conveying them by executor's deeds. (Stip. 7). She could not sell them as trustee because Genesee Valley Trust Company -- not she -- was the sole trustee. (Stip. 4). The only kind of trustee who is authorized to sell under New York law is the trustee of an "express trust." (See definition in Sec. 11-1.1(a) E.P.T.L.). Therefore, since, as we have shown, it was "reasonable and proper" (Sec. 11-1.1(b)(23) E.P.T.L.) for the executrix to incur the selling expenses in that capacity the expenses were estate expenses -- not trust expenses. In the reverse situation the Court of Appeals for the Third Circuit refused to treat a sale by trustees as if it had been made by the executors. Estate of Thomas W. Streeter v. Commissioner,

491 F.2d 375. There, the decedent's will directed his trustees to dispose of his Americana collection. The Court rejected the taxpayer's contention that the sale "was the functional equivalent of a sale by executors in order to effect distribution, and should be treated equivalently." The Court stated, however, that "if the executors had been empowered by the will to sell assets to effect distribution auctioneer fees, stipulated to be reasonable, would have been deductible."

B.

The Selling Expenses Were "Necessary" Within the Meaning of the Commissioner's Regulations.

The regulations allow expenses of sale "if the sale is necessary in order to pay the decedent's debts, expenses of administration, or taxes, to preserve the estate, or to effect distribution." (Reg. Sec. 20.2053-3(d)(2)). The Tax Court found it unnecessary to determine the validity of this regulation because it found that, on the facts of this case, the sales were necessary to effect distribution. (R. 78-80). Unless this finding is clearly erroneous, it must stand. We submit that, on the contrary, the Tax Court was clearly right.

In contending that the properties could be sold only to pay debts, expenses, taxes and the marital bequest (Brief 21), the government would read out of the regulations the allowance of deduction where a sale is made to preserve the estate or to effect distribution. These were old properties requiring substantial and continuous expenditures for maintenance and repairs. (Stip. 13, 14, R. 6). The trustee was neither equipped no willing to provide these

services. (Stip. 15, R. 6, R. 79 (footnote 6)). To foist upon an unwilling trustee a job which it did not want and was not equipped to handle would not be in keeping with good estate administration. "The duties of an Executor or Administrator are primarily and generally to settle and distribute the decedent's estate, requiring him to collect the securities, sell the property, convert the assets into cash, pay the debts and expenses, and distribute the net residue in accordance with the provisions of the Will or of law." (Emphasis added). 2 Harris, "New York Estates Practice Guide" (3rd ed.) 365, section 415; Kohler, 231 N.Y. 353, 132 N.E. 114. Further, "he owes an active duty to use diligence and care to preserve the value of estate assets and prevent loss * * * ." Harris, ibid., section 415.

Plainly the will contemplated that the executrix would do precisely what she did. It confers upon the trustee, but not upon the executrix, the power to made distribution in kind. (R. 62-64, particularly Paragraph Fourth). It directs the trustee to exercise a power of invasion "in a liberal fashion" for the widow, and of course it would need cash for this purpose. (R. 62, Paragraph Fourth). If the widow were to predecease the testator, the residue of the property was to be distributed in four portions (R. 63, Paragraph Fifth), and the real properties clearly were not suitable for this purpose.

Although the trustee requested that the sales be made, it was also reasonable and proper, and necessary from the standpoint of sound administration, that the executrix sell them, quite independently from the trustee's request.

We submit also that, in these circumstances, an executor must have reasonable latitude in determining when or whether to convert old houses into cash. The expenses of sale were relatively small (Stip. 3, R. 21), and are stipulated to be reasonable in amount. (Stip. 12, R. 24). The situation is therefore quite different from that in Smith where, as the Tax Court found, "the will itself contemplated a distribution of the sculptures in kind to the trusts for the benefit of Smith's daughters" (57 T.C. at 661), and the selling commissions exceeded \$1.5 million. If, as in this case, an executor has acted reasonably and in accordance with State law, a fair construction of the regulations requires that the expenses of sale be regarded as "necessary" for federal estate tax purposes as well as local law purposes. This is really the construction which the Fifth Circuit puts upon the regulations in Pitner v. United States, 388 F.2d 651, 660, a case upon which the government relies. It points out that:

"The regulations refer to expenditures necessary to the 'settlement' of the estate * * *. Such expenses would include, in the words of section 20.2053-3(a), those incurred 'in the collection of assets, payments of debts, and distribution of property to the persons entitled to it.'" (Emphasis the Court's).

The Court continues as follows:

"If the litigation in which the expenses were incurred facilitated the distribution of the property to the persons entitled to it then the expenses come within the statute." (Emphasis added).

Thus, the Fifth Circuit in Pitner equated the term "necessarily incurred" in the regulations with facilitating the distribution of property. So, the decision in Pitner in fact supports the taxpayer's

position here. For it cannot be doubted that the sales by the executrix "facilitated the distribution of the property to the persons entitled to it."

In other contexts the Courts have construed the term "necessary" as having considerable flexibility. In Commissioner v. Walter F. Tellier, 383 U.S. 687, a case dealing with whether expenses were "ordinary" and "necessary" under section 162(a) of the Code, the Supreme Court said:

"Our decisions have consistently construed the term 'necessary' as imposing only the minimal requirement that the expenses be 'appropriate and helpful' * * *." (383 U.S. at 689).

This Court applied the same standard in Newi v. Commissioner, 432 F.2d 998, affirming a Tax Court decision (T.C. Memo 1969-131). To read the term "necessary" in the Commissioner's regulations under section 2053(a) as including what is "reasonable or proper" to effect distribution under State law is, we submit, considerably less of a relaxation of the literal than to read "necessary" under section 162 (a) as including "appropriate and helpful."

It does not advance resolution of this question to argue that the selling expenses were incurred for the benefit of the trust, not the estate. In a broad sense everything an executor does is for the benefit of his distributees; otherwise he may be subject to surcharge. Park v. Commissioner, 475 F.2d 673, 676. This is quite different from the situation in Smith where, as the Tax Court found, "the will itself contemplated a distribution of the sculptures in kind to the trusts * * *." (57 T.C. at 661).

Accordingly, the sales in question met the tests of both State law and of the Commissioner's regulations, properly construed. If, however, it is determined that the test of the regulations was not met, the regulations are invalid as going beyond the statute, as held in Estate of Park v. Commissioner, 475 F.2d 673 (C.A. 6) and Ballance v. United States, 347 F.2d 419 (C.A. 7).

II.

THE QUESTIONS INVOLVED IN THIS CASE ARE QUESTIONS OF FACT AND QUESTIONS TO WHICH THE "CLEARLY ERRONEOUS" RULE APPLIES, AND THE FINDINGS AND DETERMINATION OF THE TAX COURT WERE NOT CLEARLY ERRONEOUS.

The questions in this case, assuming that the Commissioner's regulations are valid, are whether (1) the sales were necessary to preserve the estate or to effect distribution, and (2) whether the expenses were incurred for the benefit of the estate rather than for the individual benefit of heirs, legatees, or devisees. (Reg. Sec. 20.2053-3(a) and (d)). These are questions of fact. That being so, a Court of Appeals will not disturb the findings of the Court below unless clearly wrong. This Court recently reaffirmed that principle in Silverman v. Commissioner, ___ F.2d ___ (decided June 21, 1976). Quoting from its earlier decision in Sisto Financial Corp. v. Commissioner, 149 F.2d 268, 269 (1945), this Court said:

"Our powers of review are very straitly limited upon all issues of fact * * *."

While those cases involved valuation, the same principle no less applies to the factual questions involved in this case. Indeed,

the "clearly erroneous" rule was the real basis for this Court's decision in Smith. The Tax Court there found that the will contemplated a distribution of the sculptures in kind to the trusts, and that "to the extent that the executors made decisions to sell in order to provide support money, they were acting on behalf of the trust and not on behalf of the estate." (57 T.C. 650, 661). (With five judges dissenting). This Court stated that, "there is some question as to whether some of these expenses were in fact incurred for the benefit of the estate in accordance with the general purpose of section 2053 rather than for the benefit of individual beneficiaries." (510 F.2d 479, 482). It pointed out that the Tax Court's determination resulted from a "de novo inquiry into the factual necessity for these expenditures." (510 F.2d 479, 483). (Emphasis added). It held (Judge Mulligan dissenting) that, "as the determination of the Tax Court is not clearly erroneous, it is affirmed." (510 F.2d at 483).

It is therefore clear that this Court's affirmance of Smith rested upon an application of the "clearly erroneous" rule to the factual determinations of the Tax Court, including the Tax Court's determination of New York law upon de novo inquiry. We respectfully infer that had the Tax Court made factual determinations in the taxpayer's favor in the Smith case, as it did in this case, this Court, applying the "clearly erroneous" rule, would have affirmed.

Whether the expenditures are incurred in the proper settlement of the estate or for the benefit of individual legatees is not only a question of fact, but often a fuzzy one. This Court so recognized in Smith. See also this Court's opinion in John Foster Dulles v.

Johnson, 273 F.2d 362, 369, and Pitner v. United States, 388 F.2d 651, 660 (C.A. 5th). In keeping with the above authorities, a factual determination of this question ought not to be disturbed on review except in most unusual circumstances.

The Tax Court in this case found, among other things, that:

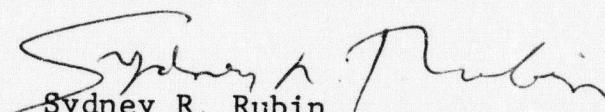
(1) "because of the age of the properties, it was necessary, from time to time, to expend sums for maintenance and repairs" (R. 69),

(2) "the trustee did not wish to accept as trust property the rental real estate * * *" (R. 79), and "the properties were old and required maintenance and repairs which the trustee was neither equipped nor willing to provide" (R. 79, footnote 6); and (3) "the selling expenses were necessarily incurred to effect the distribution of the residuary estate" within the meaning of the regulations (R. 80), and "are allowable administration expenses under New York law." (R. 75). These findings are not clearly erroneous by any standard of review, and therefore the Tax Court's decision should be affirmed.

CONCLUSION

The decision of the Court below should be affirmed.

Respectfully submitted,


Sydney R. Rubin
RUBIN AND LEVEY
950 Crossroads Building
2 Main Street East
Rochester, New York 14614
Attorneys for Appellee

September 3 , 1976

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2053. EXPENSES, INDEBTEDNESS, AND TAXES.

(a) General Rule.--For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts--

- (1) for funeral expenses,
- (2) for administration expenses,
- (3) for claims against the estate, and
- (4) for unpaid mortgages on, or any indebtedness in respect of, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate,

as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

* * *

Treasury Regulations relating to Estate Taxes (1954 Code) (26 C.F.R.):

§ 20.2053-1 Deductions for expenses, indebtedness, and taxes; in general.

* * *

(b) Provisions applicable to both categories--* * *

(2) Effect of court decree.* * * a deduction for the amount of a bona fide indebtedness of the decedent, or of a reasonable expense of administration, will not be denied because no court decree has been entered if the amount would be allowable under local law.

* * *

§ 20.2053-3 Deduction for expenses of administering estate.

(a) In general. The amounts deductible from a

decedent's gross estate as "administration expenses" of the first category (see paragraphs (a) and (c) of § 20.2053-1) are limited to such expenses as are actually and necessarily incurred in the administration of the decedent's estate; that is, in the collection of assets, payment of debts, and distribution of property to the persons entitled to it. The expenses contemplated in the law are such only as attend the settlement of an estate and the transfer of the property of the estate to individual beneficiaries or to a trustee, whether the trustee is the executor or some other person. Expenditures not essential to the proper settlement of the estate, but incurred for the individual benefit of the heirs, legatees, or devisees, may not be taken as deductions.
* * *

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* * * (d) Miscellaneous administration expenses.

(2) Expenses for selling property of the estate are deductible if the sale is necessary in order to pay the decedent's debts, expenses of administration, or taxes, to preserve the estate, or to effect distribution. * * *

New York Statutes:

§ 222 of the New York Surrogate's Court Act (superseded as of September 1, 1967 by Estates, Powers and Trusts Law):

§ 222. Payment of expenses incurred by representative.

An executor, administrator, guardian or testamentary trustee may pay from the funds or estate in his hands, from time to time, as shall be necessary, his legal and proper expenses of administration necessarily incurred by him, including the reasonable expense of obtaining and continuing his bond and the reasonable counsel fees necessarily incurred in the administration of the estate. Such expenses and disbursements shall be set forth in his account when filed, and settled by the surrogate.

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§ 11-1.1(b) New York Estates, Powers and Trusts Law:

(b) In the absence of contrary or limiting provisions

in the court order or decree appointing a fiduciary, or in a subsequent order or decree, or in the will, deed or other instrument, every fiduciary is authorized: * * *

(5) With respect to any property or any estate therein owned by an estate or trust, except where such property or any estate therein is specifically disposed of:

(B) To sell the same at public or private sale, and on such terms as in the opinion of the fiduciary will be most advantageous to those interested therein.

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(23) [renumbered as of June 22, 1973 as (22)]. In addition, to those expenses specifically provided for in this paragraph, to pay all other reasonable and proper expenses of administration from the property of the estate or trust, including the reasonable expense of obtaining and continuing his bond and any reasonable counsel fees he may necessarily incur.

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§ 13-1.3 New York Estates, Powers and Trusts Law:

§ 13-1.3 Assets chargeable with payment of estate obligations; order in which assets appropriated; abatement.

(a) All of the property of a decedent, and any income therefrom in the course of estate administration, is chargeable with the payment of:

(1) Administration and reasonable funeral expenses, debts of the decedent and any taxes for which the estate is liable.

(2) Unless such property is specifically disposed of, any general dispositions.

(b) In applying such property to the payment of any item specified in paragraph (a), no distinction shall be made between real and personal property.

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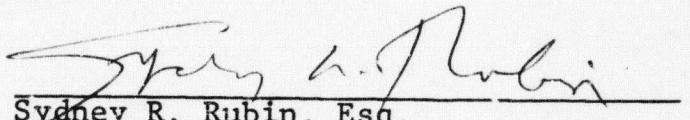
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CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing three copies thereof on this 3rd day of September, 1976, in an envelope, with postage prepaid, properly addressed to him as follows:

Scott P. Crampton, Esq.
Assistant Attorney General,
Tax Division,
Department of Justice,
Washington, D. C. 20530


~~Sydney R. Rubin, Esq.~~
Attorney for Appellee